

Brooklyn Journal of International Law

Volume 42 | Issue 2

Article 2

5-1-2017

The Migingo Island Dispute Between Kenya and Uganda

Christopher R. Rossi

Follow this and additional works at: <https://brooklynworks.brooklaw.edu/bjil>



Part of the [International Law Commons](#), [Other Law Commons](#), [Public Law and Legal Theory Commons](#), and the [Transnational Law Commons](#)

Recommended Citation

Christopher R. Rossi, *The Migingo Island Dispute Between Kenya and Uganda*, 42 Brook. J. Int'l L. 659 (2018).
Available at: <https://brooklynworks.brooklaw.edu/bjil/vol42/iss2/2>

This Article is brought to you for free and open access by the Law Journals at BrooklynWorks. It has been accepted for inclusion in Brooklyn Journal of International Law by an authorized editor of BrooklynWorks.

THE MIGINGO ISLAND DISPUTE BETWEEN KENYA AND UGANDA

*Christopher R. Rossi**

"[Africa's] great hydrographic basins . . . tend to become new areas of conflict. Around these basins not only economic activities but also serious contradictions have emerged. The noncoincidence of the borders of states and natural borders has opened the way to disputes over sovereignty."¹

INTRODUCTION.....	659
I. MIGINGO'S FATE IN CONTEXT	671
<i>A. The Scramble for Africa</i>	671
<i>B. Imperial Line Drawing</i>	676
II. CARTOGRAPHIC SHORTCUTS AND A FUTURE PROBLEM FOR INTERNATIONAL LAW.....	680
<i>A. The 1926 British Order in Council</i>	681
III. UTI POSSIDETIS, LES EFFECTIVITÉS, AND AFRICAN ELITES.....	685
<i>A. Historical Confusion, Uti Possidetis, and the Value of Effectivités</i>	688
CONCLUSION	690

INTRODUCTION

Migingo is one of three closely situated islands in the eastern waters of Lake Victoria,² approximately fifteen kilometers from the nearest Kenyan mainland port in the western

* Adjunct faculty member, University of Iowa College of Law. The author thanks S.J.D. student Dan Ngabirano, Prof. Busingye Kabumba, Prof. Julie MacArthur, and Iowa law librarian, Don Ford for comments or assistance.

1. Achille Mbembe *At the Edge of the World: Boundaries, Territoriality, and Sovereignty in Africa* 272–73 (2000).

2. The two other islands are Ugingo (Usingo) and Pyramid Island. Ugingo is two hundred meters (660 feet) east of Migingo; Pyramid Island is two kilometers (1.2 miles) south of Migingo. The lake has many names. On the Tanzanian side, it is referred to as Lake Ukerewe. It is also known as Nalubaale,

Migori district, and two hundred kilometers from the nearest mainland port in Uganda.³ It measures about one half acre in size,⁴ or two thousand square meters (twenty-two thousand square feet). For most of its history, it remained an uninhabited outcropping, a dot on the second largest fresh water lake in the world.⁵ Beginning in 2000, climate changes to the hydrological cycle of the Lake Victoria Basin,⁶ a basin long regarded as susceptible to significant water table fluctuations,⁷ resulted in alarming diminutions to the water table of Africa's largest lake.⁸

Sango, and Lolwe in other parts of East Africa. The Bantu word for the lake is Nyanza. In 1858, Richard Burton and John Speke "discovered" and named Lake Victoria in pursuit of the source of the Nile River. Many people of East Africa still refer to it by its colonial name, as it will be referenced in this article. Calls to Africanize its name, however, present some difficulty, given the many peoples of East Africa. See, e.g., Mboneko Munyaga, *Change the Name 'Lake Victoria'*, ARUSHA TIMES, http://www.arushatimes.co.tz/2011/7/Society_6.htm.

3. *Museveni Complicates Kenya-Uganda Island Dispute*, PANAPRESS (May 12, 2009), <http://www.panapress.com/Museveni-complicates-Kenya-Uganda-island-dispute—13-525259-18-lang1-index.html> (noting the island's location in relation to the nearest Ugandan and Kenyan land ports). By motorboat, the trip takes two hours from Ongukwa, Kenya. See Gragory Nyauchi, *Migingo Island: Nothing to Write Home About*, EAST AFRICAN (Jan. 9, 2015), <http://www.theeastafrican.co.ke/magazine/Migingo-island—Nothing-to-write-home-about-/434746/2582598/-/qgyg1cz/-/index.html>.

4. See Kwamchetsi Makokha, *Why Raila Should Be Barred From Invading Migingo*, DAILY NATION (Mar. 26, 2016), <http://www.nation.co.ke/oped/Opinion/Why-Raila-should-be-barred-from-invading-Migingo/440808-3133958-11gs67/index.html> (noting that Migingo measures "less than half an acre" in size).

5. See JOSEPH L. AWANGE & OBIERO ONG'ANG'A, LAKE VICTORIA: ECOLOGY, RESOURCES, ENVIRONMENT 1 (2006) (stating that Lake Victoria is the second-largest lake following Lake Superior).

6. See generally *The IPCC's Fifth Assessment Report: What's In It For Africa*, CLIMATE & DEV. KNOWLEDGE NETWORK (2014), http://cdkn.org/wp-content/uploads/2014/04/AR5_IPCC_Whats_in_it_for_Africa.pdf.

7. Joseph L. Awange et al., *GRACE Application to the Receding Lake Victoria Water Level and Australian Drought*, in OBSERVING OUR CHANGING EARTH 387, 387 (Michael G. Sideris ed., 2008) (noting significant lake-level fluctuations in the early 1960s and stating that, by 2006, the lake's level dropped more than 1.1 meters below its ten-year average).

8. See AWANGE & ONG'ANG'A, *supra* note 5, at 327 (receding at an alarming rate). See also Joshua Kyalimpa, *Experts Warn of Dire Consequences as Lake Victoria's Water Levels Drop Further*, INTER PRESS SERVICE (Sept. 23, 2014), <http://www.ipsnews.net/2014/09/experts-warn-of-dire-consequences-as-lake-victorias-water-levels-drop-further/>.

Despite dire long-term implications,⁹ the receding water presented an economic opportunity for a small number of enterprising fishermen, who began using Migingo's newly exposed craggy shore as a port in 2001.¹⁰ Reports soon circulated that its surroundings earned fishermen three to four times in a day what shore-based counterparts earned in a month.¹¹ Migingo's reputation as a rich fishing ground swelled its population to more than one thousand inhabitants,¹² quickly turning the islet into a microslum. But, its position in the lake makes the half-acre island a strategic offshore weigh station and encampment for commercial export of Nile perch (*mbuta*),¹³ attracting as epiphenomena pirates,¹⁴ smugglers,¹⁵ and contested claims of sovereignty.

Ecologists have long puzzled over the appearance of Nile perch in Lake Victoria's waters. Some evidence suggests Uganda's

9. See Awange et al., *supra* note 7, at 387 (signaling disastrous challenges ahead for the thirty million people whose livelihood depends on Lake Victoria's health).

10. See Kakeeto A. Richard et al., *Managing Trans-Boundary Water Conflicts on Lake Victoria with Reference to Kenya, Uganda and Tanzania*, in SHARED WATERS, SHARED OPPORTUNITIES: HYDROPOLITICS IN EAST AFRICA 65, 67 (Bernard Calas & C.A. Mumma Martinon eds., 2010) (noting the appearance of water patrols in 2001 due to fishing on Migingo).

11. Sam Shead, *A Real Treasure Island! Small Land Mass Housing Shanty Town Is at Heart of Battle Over Prime Fishing Waters*, DAILY MAIL (Sept. 14, 2012, 8:20 PM), <http://www.dailymail.co.uk/news/article-2203467/A-real-treasure-island-Small-land-mass-housing-shanty-town-heart-battle-prime-fishing-waters.html>.

12. Emmanuel Kisiangani, *Dispute Over Migingo Escalates*, INST. FOR SECURITY STUD. (Aug. 17, 2011), <https://www.issafrica.org/iss-today/dispute-over-migingo-escalates>. 80 percent of Migingo's inhabitants are Kenyans, the remainder is split between Ugandans and Tanzanians. *Id.*

13. Numerous reports indicate that two Kenyan fishermen, Dalmas Tembo and George Kibebe, first settled on the islands in 1991, followed by Ugandan fisherman, Joseph Nsubuga in 2004, who found only an abandoned house. See, e.g., Kelvin Odoobo, *The Migingo Island Circus*, NEW TIMES (Apr. 26, 2009), <http://www.newtimes.co.rw/section/read/78895/>.

14. See *Uganda Kills 3 Tanzanian Pirates on Migingo Island*, NEW VISION (Oct. 6, 2015, 10:18 AM), http://www.newvision.co.ug/new_vision/news/1410150/uganda-kills-tanzanian-pirates-migingo-island; Daniel Howden, *Migingo: Big Trouble on Small Island*, INDEPENDENT (Mar. 22, 2009, 12:00 AM), <http://www.independent.co.uk/news/world/africa/migingo-big-trouble-on-small-island-1651736.html>.

15. See Eric Shimoli & Patrick Mayoyo, *Revealed: Hidden Players in Migingo*, DAILY NATION (May 16, 2009), <http://www.nation.co.ke/News/-/1056/598728/-/u69u28/-/index.html> (revealing well-organized smuggling operations enjoying patronage from Ugandans with Kenyan connections).

Game and Fisheries Department secretly introduced the nonnative species in the 1950s to bolster sport fishing.¹⁶ By the 1980s, its population had exploded, coinciding with a fivefold increase in its commercial value as a restaurant item in Europe.¹⁷ The fish also is a devastating piscivore, “one of the best-studied invasive species in history.”¹⁸ It threatens half of Lake Victoria’s five hundred species of endemic cichlid fish with extinction, upsets the ecological balance of the world’s largest tropical lake,¹⁹ and is turning this diverse multispecies Great Lake into an anthropogenic adulteration, mostly sustaining three fish species.²⁰ The acute financial and resource dispute over the Nile perch catch, which may ultimately self-regulate through overfishing, overshadows a coming ecological disaster that would affect the livelihood of thirty million people around Lake Victoria’s shore.²¹

16. Robert M. Pringle, *The Origins of the Nile Perch in Lake Victoria*, 55 *BIOSCIENCE* 780, 783 (Sept. 2005).

17. *Id.* See also UGANDA FISH PROCESSORS AND EXPORTERS ASSOCIATION, <http://www.ufpea.co.ug/> (last visited July 21, 2017) (identifying the European Union as the largest market for Nile perch).

18. Pringle, *supra* note 16, at 780.

19. Dirk Verschuren et al., *History and Timing of Human Impact on Lake Victoria, East Africa*, 269 *PROC. R. SOC. LONDON* 289, 289 (2002) (discussing the probable extinction of up to half of Lake Victoria’s five hundred species of endemic cichlid fishes); Sy Montgomery, *The Fish That’s Killing Lake Victoria*, *L.A. TIMES* (Feb. 22, 1988), http://articles.latimes.com/1988-02-22/local/me-30078_1_lake-victoria/2.

20. See Pringle, *supra* note 16, at 780 (listing the Nile perch, the nonindigenous Nile tilapia, and the diminutive *R. argentea* as the three remaining species of fish).

21. See Kiarie Njoroge, *Kenya Fish Earnings Flat as Nile Perch Numbers Drop, Survey Shows*, *BUS. DAILY* (May 15, 2016, 3:47 PM), <http://www.businessdailyafrica.com/Kenya-fish-earnings-flat-as-Nile-Perch-numbers-drop/-/539546/3204600/-/pbl6xz/-/index.html> (reporting a 15 percent decrease in the Kenyan harvest of fresh water fish, mainly attributed to the decline in fish catches from Lake Victoria); O.C. Mkumbo & B.E. Marshall, *The Nile Perch Fishery of Lake Victoria: Current Status and Management Challenges*, 22 *FISHERIES MGMT AND ECOLOGY* 56 (2015). Dropping water levels have destroyed the shallow water breeding grounds of Nile perch, making Migingo’s surrounding waters one of the few remaining breeding grounds. See generally Ernest Waititu, *DIMINISHING WATER RESOURCES THREATEN PEACE*, *PULITZER CENTER ON CRISIS REPORTING* (May 26, 2009), <http://pulitzercenter.org/articles/diminishing-water-resources-threaten-peace>. A variety of international and regional organizations have formed to manage the ecology and economics of Lake Victoria/Nyanza, including the Lake Victoria Basin Commission (2001), a specialized institution of the East African Community (EAC); the Lake Victoria Fisheries Organization, established by the 1994 Convention for

But, rich harvests of Nile perch currently generate \$250 million USD in yearly trade for the East African economies of Kenya, Uganda, and Tanzania.²² Migingo's proximity to the Kenyan shore decisively controls the economics of this industry,²³ and the majority of its inhabitants are ethnic Luos from Kenya.²⁴ Kenya owns 6 percent of Lake Victoria, but its processors harvest 180,000 metric tons of fish for export; Uganda, however, owns 43 percent of the lake but exports only seventy thousand metric tons through its processing plants.²⁵ The perceived imbalance in the Nile perch trade, compounded by the discovery of

the Establishment of the Lake Victoria Fisheries Organization; the Lake Victoria Environmental Management Project, involving Kenya, Tanzania, Uganda, and the World Bank (founded in 1994, and expanded in 2010); the Partnership Agreement on the Promotion of Sustainable Development in Lake Victoria (between the EAC and the governments of Sweden, France, and Norway, the World Bank, and the East African Development Bank (2001); and the Nile River Basin Initiative (2006). See INTERNATIONAL WATERS GOVERNANCE, <http://www.internationalwatersgovernance.com/lake-victoria-basin-commission-and-the-lake-victoria-fisheries-organization.html> (last visited July 22, 2017). Rwanda and Burundi have been added to the Lake Victoria Fisheries Organization as part of an expanded lake catchment region. See Joint Communiqué of the Council of Ministers of the Lake Victoria Fisheries Organization Issued in Nairobi, Kenya on 29th January 2016, East African Community Lake Victoria Fisheries Organization Secretariat, <http://www.internationalwatersgovernance.com/lake-victoria-basin-commission-and-the-lake-victoria-fisheries-organization.html>.

22. See Mkumbo & Marshall, *supra* note 21, at 56 (noting that, despite indications of decline, the Nile perch accounts for 60 percent of the total landed value of fish from Lake Victoria).

23. The nearest Ugandan land port is approximately one hundred kilometers from Migingo; the nearest Kenyan land port is ten kilometers away. See Peter Wafula Wekesa, *Old Issues and New Challenges: The Migingo Island Controversy and the Kenya-Uganda Borderland*, 4 J. E. AFR. STUD. 331, 335 (2010).

24. *Id.* at 331.

25. See Ugandan Perspective on Migingo Island Border Issue (Hoover), U.S. Dep't of State Cable No. 09Kampala482_a, WIKILEAKS (May 8, 2009), https://wikileaks.org/plusd/cables/09KAMPALA482_a.html (unclassified cable from the U.S. Embassy in Kampala to [U.S.] Secretary of State, Intergovernmental Authority on Development (IGAD), Rwanda).

commercially viable oil deposits across the East African Rift System in 2006,²⁶ possibly including deposits under Lake Victoria,²⁷ weigh heavily in the emergence of a major East African dispute.²⁸

Kenya and Uganda dispute ownership of Migingo, which has led to multiple confrontations, war talk,²⁹ mediated bilateral and multilateral discussions,³⁰ and debates in the East African Legislative Assembly and the Pan African Parliament.³¹ Even if Migingo were indisputably in Kenya's sovereign waters, as

26. May Jeong, *Uganda: Oil Brings Quick Cash, Dashed Hopes*, ALJAZEERA AM. (May 30, 2015), <http://america.aljazeera.com/articles/2015/5/30/uganda-oil-brings-fast-cash-dashed-hopes.html> (noting exploratory oil strikes by British, French, and Chinese companies in the Albertine Basin in 2006). The East African Rift System involves the earth's tectonic forces that cover Ethiopia, Kenya, Uganda, and Tanzania. See James Wood & Alex Guth, *East Africa's Great Rift Valley: A Complex Rift System*, GEOLOGY.COM, <http://geology.com/articles/east-africa-rift.shtml> (last visited Apr. 1, 2017).

27. Duncan Macgregor, *History of the Development of the East African Rift System: A Series of Interpreted Maps Through Time*, 101 J. AFR. EARTH SCI. 232, 250 (2015) (concluding that, likely, there are more petroleum systems to be discovered across the East African Rift System).

28. See *The Migingo Island Dispute Which Way for Kenya and Uganda*, NATIVE E. AFR. (Mar. 24, 2016), <http://native-eastafrica.org/the-migingo-island-dispute-which-way-for-kenya-and-uganda/> (noting that the delayed development of Uganda's fishing industry following years of misrule and neglect is a major cause of the dispute).

29. See Speech of President Kibaki Opening the Third Session of the Tenth Parliament, *reprinted in* U.S. Dep't of State, *Cable No. 09Nairobi809_a*, WIKILEAKS (Apr. 21, 2009), https://wikileaks.org/plusd/cables/09NAIROBI809_a.html (unclassified cable (Ranneberger), Kibaki Addresses Opening of Parliament); Risdell Kasasira & John Njagi, *Kenyan MP Calls for War over Migingo*, DAILY MONITOR (Mar. 17, 2016), <http://www.monitor.co.ug/News/National/Kenyan-MP-calls-for-war-over-Migingo-/688334/3121072/-/pr8xsr/-/index.html>; Kwamchetsi Makokha, *Why Raila Should be Barred from Invading Migingo: Raila Odinga Could Easily Plunge Kenya into War over a Rocky Piece of Land*, DAILY NATION (Mar. 26, 2016), <http://www.nation.co.ke/oped/Opinion/Why-Raila-should-be-barred-from-invading-Migingo/-/440808/3133958/-/4xhpyq/-/index.html> (discussing former Kenyan prime minister Raila Odinga's belligerent stance against Uganda).

30. For instance, at the Lusaka African Union Summit (2009); the Kampala Bilateral Ministerial Meeting (2009); the Kisumu Technical Officers' Meeting (2009); and the Kenya-Uganda joint meeting on the resumption of the joint boundary summit (2011).

31. *National Assembly Official Report*, KENYA NATIONAL ASSEMBLY OFFICIAL RECORD (HANSARD) 7 (June 3, 2009) (statement of Mrs. Shabesh on East African Legislative Assembly and Pan African Parliament debates).

Uganda's President Yoweri Museveni may have suggested,³² much of the catch allegedly derives from fishing activity in Ugandan waters, giving rise to unyielding Ugandan claims of Kenyans' poaching and tax evasion and Ugandan police and military presence in the disputed area.³³ Kenyan fishermen insist, however, with some scientific support, that the Nile perch breed off Kenya's swampy lakeshore and migrate into deeper water around Migingo, thus entitling the country to take the fish wherever caught.³⁴ The argument lacks legal support today but highlights a codependency condition that one day may facilitate resolution. The argument stirs proprietary assertions over lakes and seas reminiscent of sixteenth century European debates: the seas must be "kept" (chiefly) for fishing.³⁵ It also highlights the

32. During a 2009 lecture in Dar es Salaam, Tanzania, the president of Uganda was quoted as saying: "The island is in Kenya, the water is in Uganda." Eric Shimoli, *Museveni: You Got Me Wrong On Migingo*, DAILY NATION (May, 15, 2009), <http://www.nation.co.ke/News/-/1056/598508/-/u69sfj/-/index.html>. Ugandan authorities later claimed the president's statement was misconstrued as applying to Migingo and insisted was actually referring to Suba Island. *See id.*; *see also Museveni Complicates Kenya-Uganda Island Dispute*, *supra* note 3 (affirming Museveni's statement that the island is in Kenya).

33. *See* Eric Shimoli & Patrick Mayoyo, *Revealed: Hidden Players in Migingo*, DAILY NATION (May 15, 2009), <http://www.nation.co.ke/News/-/1056/598728/-/u69u28/-/index.html> (noting claims that Migingo is a haven for tax evasion and of military advantage to Uganda).

34. Jeffrey Gettleman, *Ripples of Dispute Surround Tiny Island in East Africa*, N.Y. TIMES (Aug. 16, 2009), at A4.

35. William Welwood (1578–1622) made a similar argument in a rejoinder to Hugo Grotius' argument relating to the inexhaustibility of living resources of the sea in *Mare Liberum* (1609). According to Welwood:

If the uses of the seas may be in any respect forbidden and stayed it should be chiefly for the fishing. . . . For whereas aforetime the white fishes daily abounded even into all the shores of the eastern coast of Scotland, . . . the shoals of fishes are so broken and so far scattered away from our shores and coasts that no fish can now be found worth of any pains and travails, to the impoverishing of all . . . our home fishers and to the great damage of the nation.

WILLIAM WELWOOD, OF THE COMMUNITY AND PROPRIETY OF THE SEAS (1613), *reprinted in* David Armitage, *Introduction*, in *THE FREE SEA: HUGO GROTIUS* 73–74 (2004). *See also* JOHN SELDEN, *MARE CLAUSUM* (1935); THOMAS WEMYSS FULTON, *THE SOVEREIGNTY OF THE SEA: AN HISTORICAL ACCOUNT OF THE CLAIMS OF ENGLAND TO THE DOMINION OF THE BRITISH SEAS, AND OF THE TERRITORIAL WATERS: WITH SPECIAL REFERENCE TO THE RIGHTS OF FISHING AND THE NAVAL*

fluid and subjective conception of African interstitial space, which involves complex religious, commercial, and historical networks of activity that simultaneously established and blurred temporal pluralities at the edges of African borderland. One such plurality involves the porous Lake Victoria catchment, which overlaps and interlaces historical forms of identity, movement, and cultural practice.³⁶ Problems of colonialism, development, African state-building, national unity, and political consolidation³⁷ provide context but cannot mask the concentration on emerging resources, such as the Nile perch and oil prospects, as key elements driving this conflict.

In 2004, this dispute took a problematic turn. In that year, reports surfaced of Ugandan interlopers (settlers) appearing on Migingo, vexing Ugandan-Kenyan relations.³⁸ By 2006, Ugandan customs officers arrived and began assessing levies on Kenyan fish harvests.³⁹ Uganda's Fisheries Ministry organized a Migingo Beach Management Unit to oversee the collection of administration fees.⁴⁰ Between 2008 and 2009, tensions between the two countries elevated when the Ugandan Marines occupied the islet⁴¹ and expelled Kenyan fisherman for failing to pay licensing fees and for not using Ugandan processors for all fish caught within Ugandan territorial waters.⁴² At this time, a

SALUTE A 29 (2005) [1911]. In *Mare Liberum*, Hugo Grotius conceded that, unlike seas, lakes could be owned because lakes did not have the same fluid character as seas—they “wash against the land on all sides.” HUGO GROTIUS, *MARE LIBERUM* 1609–2009, 81 (Robert Feenstra ed., 2009).

36. See Achille Mbembe, *At the Edge of the World: Boundaries, Territoriality, and Sovereignty in Africa*, 12 PUBLIC CULTURE 259, 259–60 (2000) (noting the historical and overlapping temporal pluralities across Africa's porous borderland regions, including African watersheds).

37. See Wekesa, *supra* note 23.

38. See, e.g., Milton Olupot, *Kenya: Ugandan Settled on Migingo in 2004*, ALLAFRICA (Mar. 29, 2009), <http://allafrica.com/stories/200903300126.html> (reporting on the appearance of Ugandan occupiers of Migingo in 2004).

39. Cable, U.S. Embassy: Migingo Island—The View From Kenya, WIKILEAKS (May 8, 2009), <http://www.scoop.co.nz/stories/WL0905/S01128/cablegate-migingo-island-the-view-from-kenya.htm>.

40. *Id.*

41. See *National Assembly Official Report*, KENYA NATIONAL ASSEMBLY OFFICIAL RECORD (HANSARD) 3327–28 (Nov. 11, 2008). See generally Jack Shaka, *Migingo Island: Kenyan or Ugandan Territory?* 4 J. CONFLICTOLOGY 34, 34 (2013).

42. See *National Assembly Official Report*, *supra* note 41 (recording a Kenyan parliamentary debate on pursuing a high-level diplomatic resolution to the

Ugandan flag also appeared over the islet.⁴³ In response, twelve Kenyan police dispatched to reassert sovereignty over Migingo, prompting the arrival of sixty Ugandan marines one day later.⁴⁴ The occupation provoked Kenyan rioters to uproot landlocked Uganda's vital rail link to the Kenyan port of Mombasa, through which 80 percent of Ugandan imports arrive.⁴⁵ Consequently, Uganda and Kenya stood at the brink of Africa's smallest war. High-level diplomatic discussions produced a fragile arrangement, allowing fishermen from both countries to continue business as usual under joint police supervision until a Joint Technical Committee of experts evaluated the disputed border.⁴⁶ Matters of criminal jurisdiction were to be referred to the courts of the suspect's nationality.⁴⁷ Surveying work, however, stalled when the joint verification team disagreed on methodology,⁴⁸ and a new row erupted in early 2016, when the Ugandan-controlled Beach Management Unit shut down a Kenyan electoral

occupation of the island by Ugandan forces and the posting of the country's flag).

43. See Howden, *supra* note 13 (reporting that Uganda's national flag was hoisted over the island along with another flag bearing the colors of the Ugandan police authority).

44. See *id.*

45. See THE MARITIME PORT OF MOMBASA, N. CORRIDOR TRANSIT AND TRANSPORT COORDINATION AUTHORITY (2016), <http://www.ttcanc.org/page.php?id=27> (last visited July 22, 2017).

46. See Barbara Among & Reuben Olita, *Uganda Has Lowered Its Flag on the Disputed Migingo Island in Lake Victoria to Pave Way for the Demarcation Exercise*, NEW VISION (Apr. 28, 2009), http://www.newvision.co.ug/new_vision/news/1221958/uganda-removes-flag-migingo. A Joint Ministerial Communication signed in Nairobi on July 26, 2011, and announced in Kampala by Uganda's Inspector General of Police and Kenya's Commissioner of Police, limited police presence to twelve officers from each country. See Risedel Kasasira, *Uganda, Kenya Reach Accord over Rocky Migingo Island*, DAILY MONITOR (Aug. 24, 2011), <http://mobile.monitor.co.ug/News/-/691252/1224264/-/format/xhtml/-/maj12vz/-/index.html>. See also GBENGA ODUNTAN, *INTERNATIONAL LAW AND BOUNDARY DISPUTES IN AFRICA* 159–60 (2015).

47. See Kasasira, *supra* note 46.

48. See Kisiangani, *supra* note 12 (discussing technicalities besetting the 2009 joint East African cooperative initiative to demarcate the disputed border on Lake Victoria). The Uganda team returned to Kampala after disputing the erection of a new boundary pillar demarcating the westernmost point within the meaning of the 1926 British Order in Council. The Kenyan surveyors unofficially completed the survey, claiming Migingo Island was 510 meters (1,670 feet) east of the Kenya-Uganda border. *Id.*

commission's attempt to register islanders.⁴⁹ A joint communiqué issued by the Kenya-Uganda Joint Border Commission urged expedited resolution of the marine boundary issue and resolved to constitute a joint committee to end the dispute.⁵⁰ Were it only so easy.

The Migingo Island dispute intertwines latent intramural and international issues of ethnicity, nationality, and politics around the temptations of competing sovereign claims over newly emergent resources. If Migingo is Africa's smallest war in waiting, its elusive resolution presents problems for bilateral relations and for East African cooperative initiatives of economic and political integration.⁵¹ The dispute directly challenges efforts of the African Union Border Program to solve border conflicts in Africa and in cross-border areas involving strategic resources.⁵² Migingo represents another example of one of the enduring problems of postcolonial Africa: the lingering effects of *uti possidetis* (as you possess, so you may possess), which accommodated postcolonial line drawing rather than the human geography affected by its

49. Manuel Odeny, *Tension on Migingo Island After Uganda Police Stop Voter Registration*, THE STAR (Mar. 9, 2016), http://www.the-star.co.ke/news/2016/03/09/tension-on-migingo-island-after-uganda-police-stop-voter-registration_c1309762.

50. Wycliff Kipsang, *Joint Team to Tackle Migingo Row*, DAILY NATION (Mar. 21, 2016), <http://www.nation.co.ke/news/Joint-team-to-tackle-Migingo-row/-/1056/3126102/-/gb0pjs/-/index.html>.

51. Wekesa, *supra* note 23, at 336, 338 (concluding that the Migingo issue exposes the underlying fragility of East African regionalism efforts and mechanisms).

52. The African Union Border Program (AUBP) is an important component of the African Union's peace and security objectives. It is funded extensively by the German government and the Deutsche Gesellschaft für Internationale Zusammenarbeit. Its efforts forwarding negotiated settlement of African border disputes were endorsed by the Executive Council of the African Union Commission. See 11th Ordinary Session, Accra, Ghana (June 25–29, 2007), *as adopted* by the Conference of African Ministers in Charge of Border Issues, ADDIS ABABA (June 7, 2007) (endorsing the AUBP and its Implementation Modalities). See also *Pan-African Conference on Maritime Boundaries and the Continental Shelf for the Implementation of the African Union Border Programme*, ACCRA (Nov. 9–10 2009), <http://www.peaceau.org/uploads/conclusions-accra-eng-.pdf> (referencing and extending the 2007 declaration). For a general overview of its activities and case studies pertaining to African demarcation and boundary issues, see DELIMITATION AND DEMARCATION OF BOUNDARIES IN AFRICA: GENERAL ISSUES AND CASE STUDIES, COMMISSION OF THE AFR. UNION, DEP'T PEACE AND SECURITY (2d ed. 2014), <http://www.peaceau.org/uploads/au-2-en-2013-delim-a-demar-user-guide.pdf>.

arbitrary application.⁵³ Interestingly, the course of dealing charted by the fishermen, and more informally by the pirates and smugglers who ply the waters, suggests that a condominium or shared sovereignty arrangement provides a solution, if only Uganda and Kenya would acknowledge this second-best outcome for Africa's most recent conflagration stemming from nineteenth century colonial rule.

This article will assess the prospects for a peaceful resolution to the Migingo Island dispute, suggesting the relevance of a constructivist perspective. Constructivism emphasizes a world of social facts that inform and are informed by human interaction.⁵⁴ The basic structures of international relations, for instance the state system and sovereignty, are intersubjective rather than material creations; and the international norms making up these structures not only regulate behavior but also shape and are shaped by behavior, ultimately communicating shared understandings, intentionally or unwittingly.⁵⁵ A constructivist approach does not explain how the world changes or what people do; it is not a theory, understood as such. It is an approach to understanding problems and evolving solutions that recognizes the social construction of reality and the dynamism of international law and relations' tools—institutions, norms, rules, and language,⁵⁶ emphasized, as is the case here, by historical context. An appreciation of historical context sheds necessary light

53. See generally GIUSEPPE NESI, *L'UTI POSSIDETIS IURIS NEL DIRITTO INTERNAZIONALE* (1996); JOSHUA CASTELLINO & STEVE ALLEN, *TITLE TO TERRITORY IN INTERNATIONAL LAW: A TEMPORAL ANALYSIS* (2003).

54. See generally NICHOLAS GREENWOOD ONUF, *WORLD OF OUR MAKING: RULES AND RULE IN SOCIAL THEORY AND INTERNATIONAL RELATIONS* (1989) (introducing the theory of constructivism).

55. Christian Reus-Smit, *The Politics of International Law*, in *THE POLITICS OF INTERNATIONAL LAW* 14, 21 (Christian Reus-Smit ed., 2004).

56. See generally Nicholas Onuf, *Constructivism: A User's Manual*, in *INTERNATIONAL RELATIONS IN A CONSTRUCTED WORLD* 58–78 (Vendulka Kubáľková, Nicholas Onuf & Paul Kowert eds., 1998).

on concrete problems of world politics⁵⁷ and avoids abstract seductions of theory,⁵⁸ while acknowledging the possibility of fragmentation of understandings, interests, and the malleable norms and rules that create opportunities for change or conflict.

The relatively small size and scale of the Migingo Island dispute reflects greater historical tendencies; Migingo's problems retell conflicts of international law that afflict international relations large and small. But, changing circumstances caused by technology, discovery, or, in this case, by changes to the Great Lake in the Anthropocene age, have awakened dormant territorial disputes that stem from deep historical divisions, exacerbated in an African context by complications rooted in colonialism and the Hobson's Choice taken by African elites to accept conditions of historical *fait accompli* by accepting border demarcations that often make no sense except to sustain *raison d'état*. Modalities for a condominium or shared sovereignty arrangement develop notwithstanding appearances of impasse but encounter the state tendency to territorialize resources when interests and abilities align. This territorializing tendency acts as a drag on negotiated solutions to the problem. Although criticized as a workable legal solution,⁵⁹ the international legal construct of condominium may, as metaphor, pick the lock held by Uganda and provide the key held by Kenya to end this dispute; but, if accomplished, it must also account for the repository vault of territorial temptation.

In addition to this introduction, this article will proceed as follows. First, Part I will situate Migingo's problem in historical context. It will focus on the partitioning of Africa by European powers in the late nineteenth century that unintentionally, but nevertheless, directly conditioned Migingo's fate. Part II will

57. See ALEXANDER WENDT, *SOCIAL THEORY OF INTERNATIONAL POLITICS* 4 (Steve Smith et. al. eds., 1999) (noting the ultimate test of any method's worth is its ability to address concrete problems).

58. See *Theory Talk #70: Nicholas Onuf*, THEORY TALKS (July 2, 2015), <http://www.theory-talks.org/2015/07/theory-talk-70.html?m=1> (acknowledging theoretical failings of constructivists).

59. See Peter Schneider, *Condominium*, in 1 *ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW* 732, 734 (Rudolf L. Bernhardt ed., 1992) (labeling condominium an "historical relic" and "patently inadequate"); J.H.W. VERZIJL, 6 *INTERNATIONAL LAW IN HISTORICAL PERSPECTIVE* 69 (J.P.S. Offerhaus & Wybo P. Heere eds., 1973) (calling condominium solutions "peculiar and exceptional").

then highlight the additional cartographic shortcuts that produced the border demarcation now in dispute and the constitutive legal document that the disputants acknowledge as controlling—the 1926 British Order in Council. Part III will identify the reason why the parties accept this document as controlling—their support of the principle of *uti possidetis*. Here, however, it is argued that the rhetorical acceptance of the principle of *uti possidetis* contrasts with its dysfunctional application, which creates an impasse and feeds through its dysfunction the territorializing temptations of Uganda and Kenya over resources at the heart of the dispute. Countering these developments are the evolving instrumentalities and agencies of shared sovereignty arrangements, which offer prospects for a condominium agreement negotiated between the disputants or through structures created by regional or continental integration organizations. This article will conclude with a discussion of all of these prospects through historical examination, underscoring an awareness that constructivism presents multiple pathways and outcomes, liberal and illiberal, that await the world of Migingo's making.

I. MIGINGO'S FATE IN CONTEXT

The dispute over Migingo transplants problems of boundary demarcation that have menaced continental Africa to an islet in the world's largest tropical lake. The topical significance of the problem belies a deep and troubled history of line drawing that overlaps the Euclidean precision of Western cartographic thinking with the interstitial and experiential spatial dynamics of African cultures.

A. *The Scramble for Africa*

Migingo's fate began with the "Scramble for Africa" in the late nineteenth century, an acceleration of imperial activity in sub-Saharan Africa first initiated by Portugal almost six centuries ago.⁶⁰ This phrase dates back to the International Association of

60. See James Duffy, *Portugal in Africa*, 39 FOREIGN AFFAIRS 481, 481 and 486 (1961) (noting the Portuguese territories in Africa established the oldest European colonies in the world beginning in the fifteenth century); cf. Jeffrey Herbst, *The Creation and Maintenance of National Boundaries in Africa*, 43 INT'L ORG. 673, 674 (1989) (noting the first penetrations by Portuguese explorers of the Zambezi River in the early 1500s).

the Congo, a Belgian expeditionary commission that concluded 450 treaties and contracts with chiefdoms of the Upper Congo between 1882 and 1884.⁶¹ The agreements allowed King Leopold II of Belgium to lay personal claim over the Congo River Basin, stimulating a climate of competitive annexation that threatened war among European powers.⁶² By this time, however, France had already penetrated Algeria and Tunis, Spain kept a “watchful eye” over Morocco’s sultan, and Italy had designs on Abyssinia and treaty rights over Somaliland.⁶³ By 1875, Britain had negotiated a majority stake over control of the Suez Canal⁶⁴ and, more alarmingly, expanded its supervisory role in Egypt following its defeat of nationalist forces during the Urabi rebellion of 1882.⁶⁵ In the Middle East generally, and in the Maghreb and Arab Africa regions specifically, colonies often existed before colonialism,⁶⁶ the protogenesis of a trading-post economy Europeans established on continental coasts.⁶⁷

To “obviate misunderstanding and disputes” over “new acts of occupation” in sub-Saharan Africa, German Chancellor Otto von Bismark, following diplomatic exchanges of *entente* with the

61. I COLONIALISM: AN INTERNATIONAL, SOCIAL, CULTURAL, AND POLITICAL ENCYCLOPEDIA 661 (Melvin E. Page, gen. ed., & Penny M. Sonnenburg, asst. ed., 2003). Welsh-American explorer, Henry Morton Stanley, was personally recruited to head up the commission (officially called the Comité d’Etudes du Haut Congo) and did so between 1879 and 1884. For his account, see I–II HENRY M. STANLEY, *THE CONGO AND THE FOUNDING OF ITS FREE STATE: A STORY OF WORK AND EXPLORATION* I–II (1885). See generally THOMAS PAKENHAM, *THE SCRAMBLE FOR AFRICA: 1876–1912* (1991); D.A. LOW, *FABRICATION OF EMPIRE: THE BRITISH AND THE UGANDA KINGDOMS 1890–1902* (2009).

62. PHILIP CURTIN, *THE EUROPEAN CONQUEST IN AFRICAN HISTORY: FROM EARLIEST TIMES TO INDEPENDENCE* 398, 410 (Philip Curtin et al., eds., 1995). See also III J.H.W. VERZIJL, *INTERNATIONAL LAW IN HISTORICAL PERSPECTIVE (STATE TERRITORY)* 532 (1970) (noting the French action to conclude treaties to secure the watershed between Congo and Niadi-Quillou basins in 1885); and A.C. McEWEN, *INTERNATIONAL BOUNDARIES OF EAST AFRICA* 230–31 (1971) (discussing power struggles in the Congo).

63. See ELIZABETH WORMELEY LATIMER, *EUROPE IN AFRICA IN THE XIX CENTURY* 189–90 (1896).

64. See Editorial Comment, *Egypt a British Protectorate*, 9 AM. J. INT’L L. 202, 202–03 (1915) (noting French interests in the Suez Canal).

65. Matthew Craven, *Between Law and History: The Berlin Conference of 1884–1885 and the Logic of Free Trade*, 3 LON. REV. INT’L L. 31, 36 (2015).

66. See JUAN RICARDO COLE, *COLONIALISM AND REVOLUTION IN THE MIDDLE EAST: SOCIAL AND CULTURAL ORIGINS OF EGYPT’S URABI MOVEMENT* 3 (1999).

67. Mbembe, *supra* note 36, at 265.

French foreign ministry,⁶⁸ convened fifteen states for the Berlin West Africa Conference of 1884–1885.⁶⁹ The resulting General Act remains a centerpiece of international law’s close nineteenth-century association with imperialism.⁷⁰ Although focused on navigation possibilities of the Congo and Niger watersheds, by 1900, the conference established the informal ground rules for European continental conquest that partitioned Africa along lines that looked much as they would in 1960, when seventeen African nations achieved independence, or even later.⁷¹ The conference, through its amalgam of ancillary discussions, also served as a template for the regulation of another kind of tributary system—the divisible sovereignty system that subcontracted colonial government to private contractors or joint-stock companies and colonial chiefs, creating a comprador class of imperial functionaries—Western spatial *imaginaires*—who reimagined space and territory along linear boundaries and put them to a European use as they spread across Africa’s Great

68. See Craven, *supra* note 65, at 36.

69. See generally No. 128—Preamble, General Act of the Conference of Berlin, relative to the Development of Trade and Civilization in Africa, the free Navigation of the Rivers Congo, Niger, &c., the Suppression of the Slave Trade by Sea and Land, the occupation of Territory on the African Coasts, &c. Signed at Berlin 26th February 1885, in II E. HERTSLET THE MAP OF AFRICA BY TREATY 468, 468 (3rd ed. 1967) [HERTSLET, THE MAP OF AFRICA BY TREATY]. Other stated purposes of the conference included regulating trade development, free navigation on Africa’s chief rivers flowing into the Atlantic Ocean, and furthering the moral and material well-being of native populations. *Id.* Attendees included the United States, Turkey, Great Britain, Germany, Austria, Belgium, Denmark, Spain, France, Italy, the Netherlands, Luxembourg, Portugal, Russia, and the then-united Sweden and Norway. *Id.*

70. See Craven, *supra* note 65, at 31 (noting the conference’s “canonical place in historical accounts of 19th-century imperialism”). For broader presentations and critiques of international law and nineteenth century imperialism, see JOHN R. MORSS, INTERNATIONAL LAW AS THE LAW OF COLLECTIVES: TOWARD A LAW OF PEOPLE 39–53 (2013); See generally SUNDHYA PAHUJA, DECOLONISING INTERNATIONAL LAW: DEVELOPMENT, ECONOMIC GROWTH AND THE POLITICS OF UNIVERSALITY (2012); ANTHONY ANGHIE, IMPERIALISM AND SOVEREIGNTY AND THE MAKING OF INTERNATIONAL LAW (2004); MARTTI KOSKENNIEMI, THE GENTLE CIVILIZER OF NATIONS: THE RISE AND FALL OF INTERNATIONAL LAW 1860–1960 (2002); U.O. UMOZURIKE, INTERNATIONAL LAW AND COLONIALISM IN AFRICA (1979).

71. See Curtin, *supra* note 62, at 410–12.

Lakes region.⁷² These auxiliaries served as indirect agents of imperial power, penetrating deeper into Africa's interior through the conclusion of treaties and concords neither allowed nor thought possible in Europe.⁷³ The Dutch East India Company established this model in its seventeenth-century rise to prominence in Asia.⁷⁴ The Dutch East India Company's charter from the United Provinces granted it free reign to serve the state's security interests on the cheap.⁷⁵ It could raise and maintain armies and navies, pursue war or sue for peace, and divert a portion of the receipts of its commercial monopoly to strengthen its military to claim more ground and expand the interests of its state suitor.⁷⁶ The formula worked well, both in terms of destroying the Spanish trading empire in the Mediterranean and the Portuguese *Fidalgos'* (noblemen) colonial control over Asia (the *Estado da Índia*)⁷⁷ and delivering colonial rewards to the United Provinces as overseer of the commercial markets once ruled by the great sultanates of Indonesia and the Malay peninsula.

In the late nineteenth century, Africa, Germany, and Britain again took up this territorializing model.⁷⁸ A competition between German and British trading companies produced sphere-

72. See, e.g., ANTHONY KIRK-GREENE, *BRITAIN'S IMPERIAL ADMINISTRATORS 1858–1966* (2000); L.H. GANN & P. DUIGNAN, *THE RULERS OF BRITISH AFRICA 1870–1914* (1978). See also Mbembe, *supra* note 36, at 265–66 (noting the devices of discipline and command modeled on chiefdoms that extended the administrative and social power of the colonial state), 283 (“Western spatial *imaginaires*”) (footnote omitted), and 260 (discussing the domestication of world time and putting it to a different use).

73. See Curtin, *supra* note 62, at 426.

74. See, e.g., JONATHAN I. ISRAEL, *DUTCH PRIMACY IN WORLD TRADE, 1585–1740* (1989).

75. See generally A Translation of the Charter of the Dutch East-Indies Company (Verenigde Oostindische Compagnie or VOC): Granted by the States General of the United Netherlands, Mar. 20, 1602 (Rupert Gerritsen, ed., 2009), http://rupertgerritsen.tripod.com/pdf/published/VOC_Charter_1602.pdf.

76. See, e.g., VICTOR LIEBERMAN, *STRANGE PARALLELS, VOL. 2: MAINLAND MIRRORS: EUROPE, JAPAN, CHINA, SOUTH ASIA, AND THE ISLANDS* (Michael Adas, Patrick Manning, and Philip Curtin, eds. 2009).

77. See generally ISRAEL, *supra* note 74; and C.R. BOXER, *FIDALGOS IN THE FAR EAST 1550–1770* (1978).

78. See generally BISMARCK, *EUROPE AND AFRICA: THE BERLIN AFRICA CONFERENCE 1884–1885* (Stig Forster, Wolfgang Mommsen, and Ronald Robinson eds., 1988); JOHN HATCH, *THE HISTORY OF BRITAIN IN AFRICA* (1969); and *BRITAIN AND GERMAN IN AFRICA: IMPERIAL RIVALRY AND COLONIAL RULE* (Prosser Gifford & Wm. Roger Louis eds., 1967).

of-influence agreements in 1886⁷⁹ and 1890.⁸⁰ The 1890 agreement delimited the northern boundary of the German sphere of influence as “the point on the eastern side of Lake Victoria Nyanza [as it was then called] which is intersected by the 1st parallel of south latitude; thence, crossing the lake on that parallel . . . to the frontier of the Congo Free State, where it terminates.”⁸¹ A regional partition resulted, spreading westward across East Africa from Dar es Salaam and the Sultanate of Zanzibar on the Indian Ocean. The German East Africa Company took full control over Tanganyikan territories on the southern littoral of Lake Victoria,⁸² while an Imperial British East Africa Company formed (and later failed) and occupied Kenya, Uganda, and the great kingdoms of the Luo, Suba, Samia, Kisii, Luhya, Busoga, and Buganda, which border the northern and northeastern tiers of the lake.⁸³ By 1895, German and British spheres became more defined, with Germany ceding influence north of the present Kenya-Tanzania border to the British Crown, which took over the commercial monopoly previously granted to the bankrupt Imperial British East Africa Company, and declared an East African protectorate over what is now Kenya.⁸⁴ A series of agreements stemming from the Imperial British East Africa

79. See Agreement between the British and German Governments, respecting the Sultanate of Zanzibar and the opposite East African Mainland, and their Spheres of Influence, Gr. Brit.-Ger., Oct 29-Nov. 1 1886, in III HERTSLET, *THE MAP OF AFRICA BY TREATY* 882–86 (1909) [Agreement between the British and German Governments].

80. See Agreement between the British and German Governments, *supra* note 79, at 899–906

81. *Id.* at art. 1(1); MCEWEN, *supra* note 62, at 99.

82. See Curtin, *supra* note 62, at 426.

83. See M.F. HILL, *PERMANENT WAY: THE STORY OF THE KENYA AND UGANDA RAILWAY, BEING THE OFFICIAL HISTORY OF THE DEVELOPMENT OF THE TRANSPORT SYSTEM IN KENYA AND UGANDA* 12 (1949) (discussing the development of Anglo-German spheres of influence north and south of Lake Victoria (Victoria Nyanza)). For a breakdown of the early settlements, population, and demographic features of the Lake Victoria basin, see AWANGE & ONG’ANG’A, *supra* note 5, at 11–15 (2006); and Wekesa, *supra* note 23, at 334 (noting that the Kenya-Uganda border division also divided the Iteso, Saboat, and Pokot peoples).

84. See Agreement between the British and German Governments, *supra* note 79, at 383 (declaring the official East Africa Protectorate following an agreement between Great Britain and Zanzibar respecting the possessions of the Sultan of Zanzibar on the Mainland, signed at Zanzibar on December 12, 1895, *id.* at 382). See also James Thuo Gathii, *Imperialism, Colonialism, and International Law* 54 BUFFALO L.R. 1013, 1019 (2007).

Company's 1892 withdrawal from Uganda created the Uganda Protectorate under the control of the British Crown by 1894–1895.⁸⁵ Protectorates developed as a recurring, yet equivocating, form of imperial rule in the mid-to-late nineteenth century.⁸⁶ They avoided the financial costs of full incorporation, a matter of public debate and concern to the British Exchequer at this time, but allowed the colonial power to maintain influence. In 1920, Kenya became fully incorporated as a colony, while Uganda remained under protectorate status until its independence in 1962, but distinctions between the two blurred with the British practice of governing protectorates as if they were colonies.⁸⁷

B. Imperial Line Drawing

Imperial line drawing, in addition to splitting the Lake Victoria region into northern and southern spheres of great power influence,⁸⁸ bisected lineages, kinships, kingdoms, ethnicities, and human histories, making the natural geography a recurring human subject of dispute for Uganda, Kenya, and their neighbors.⁸⁹

85. See Provisional Agreement between King Mwanga of Uganda, and Sir G. Portal, Uganda-Gr. Brit., May 29, 1893, in III HERTSLET, *THE MAP OF AFRICA BY TREATY*, *supra* note 79, at 393–95; Notification. British Protectorate over Uganda, June 18, 1894, *id.* at 395; Treaty. Great Britain and Uganda. British Protectorate, Gr. Brit.-Uganda, Aug. 27, 1894 [Approved by Her Majesty's Government, January 4, 1895], *id.* at 396.

86. See generally KOSKENNIEMI, *supra* note 70, at ch. 2. See also MALCOLM SHAW, *TITLE TO TERRITORY IN AFRICA: INTERNATIONAL LEGAL ISSUES* 46–48 (1986) (discussing “colonial protectorates”); and M.F. LINDLEY, *THE ACQUISITION AND GOVERNMENT OF BACKWARD TERRITORY IN INTERNATIONAL LAW: BEING A TREATISE ON THE LAW AND PRACTICE RELATING TO COLONIAL EXPANSION* 182–83 (1926) (conflating the terms, but regarding colonial protectorates as conferring a status on the protecting power, should steps be taken to annex the protected territory).

87. See Gathii, *supra* note 84, at 1033.

88. GIDEON S. WERE & DEREK A. WILSON, *EAST AFRICA THROUGH A THOUSAND YEARS: A HISTORY OF THE YEARS A.D. 1000 TO THE PRESENT DAY* 155–57 (1968).

89. See SHAW, *supra* note 86, at 50 (noting that ethnic considerations were generally ignored in the process of European colonization of Africa). Julie MacArthur also notes that “long histories of migration, intermarriage, and inter-ethnic exchange complicated bureaucratic efforts to align people into neatly ordered columns of sanctified and unchanging tribal groupings.” JULIE MACARTHUR, *CARTOGRAPHY AND THE POLITICAL IMAGINATION: MAPPING COMMUNITY IN COLONIAL KENYA* 3 (2016).

In addition to the Migingo controversy with Kenya, Uganda disputes the Moyo, Adjumani, and Yumbe district boundaries with its northern neighbor, South Sudan, and before that, Sudan,⁹⁰ and warred with Tanzania over the Kagera region.⁹¹ The colonial administrative partitioning created diasporadic pockets of ethnicity among Nilotic peoples of Kenya's Great Rift Valley,⁹² exacerbating historic tensions between large ethnic groups, such as the Luo and Kikuyu, which erupted in near genocidal carnage between 2007 and 2008.⁹³ Indeed, border disputes throughout East Africa continue to pose security threats.⁹⁴ For example, "each of the countries in Eastern Africa has had at least one border dispute with a neighbor, mainly over territorial claims, and largely over a lack of clearly defined and marked boundaries."⁹⁵

After the Belgians determined that the major central African Atlantic deltas led to navigable interiors, spurring French and German incursions into the region, the British eventually settled on an additional counterbalance to protect established Greater East African interests and to expand control. Subsequently, Britain's Royal Geographical Society underwrote Richard Burton's and John Hanning Speke's 1857–1859 search for the source of the Nile River.⁹⁶ Building on the knowledge of that

90. See Bamaturaki Musinguzi, *Africa's Long Running Border Disputes to be Settled Under Ambitious AU Programme*, DAILY NATION (Nov. 20, 2014), <http://www.nation.co.ke/lifestyle/DN2/AU-programme-to-settle-border-disputes/-/957860/2529196/-/gu7190z/-/index.html>.

91. See generally Daniel G. Acheson-Brown, *The Tanzanian Invasion of Uganda: A Just War?* 12 INT'L THIRD WORLD. STUD. J & REV. 1–11 (2001) (discussing Uganda's invasion of Tanzania in October 1978 and Tanzania's retaliatory effort to end Ugandan dictator Idi Amin Dada's rule); Fulgence S. Msafiri, *Escalation and Resolution of Border Disputes and Interstate Conflicts in Africa: The Malawi-Tanzania Case* 28 June 2011) (unpublished M.A. thesis) (<http://calhoun.nps.edu/handle/10945/5701>).

92. For a discussion on ethnic problems caused by the partitioning, see MCEWEN, *supra* note 62, at 147–49.

93. See, e.g., Jeffrey Gettleman, *Ethnic Violence in Rift Valley Is Tearing Kenya Apart*, N.Y. TIMES (Jan. 27, 2008), at A3.

94. ODUNTAN, *supra* note 46, at 157.

95. *Id.* (quoting Wafula Okomu).

96. See generally RICHARD BURTON, THE NILE BASIN [BY] RICHARD F. BURTON AND CAPTAIN SPEKE'S DISCOVERY OF THE SOURCE OF THE NILE BY JAMES MACQUEEN. NEW INTRODUCTION BY ROBERT O. COLLINS (1967) [1864]. Collins claims Burton misrepresented his intentions, informing the Royal Geographical Society of the plan to find the mythical inland talked about by Arabs—the Sea of Ujiji. See *id.* at ix–x. See generally JOHN HANNING SPEKE, WHAT LED TO THE DISCOVERY OF THE SOURCE OF THE NILE (1864); GEORGE C. SWAYNE, LAKE

geography, Britain undertook construction (using imported Indian labor) of the misnamed Ugandan Railway, an engineering masterpiece connecting Mombasa on the Indian Ocean to the northeast corner of Lake Victoria, with Kisumu as the terminus.⁹⁷ Winston Churchill noted that its construction accommodated the sole political concern of securing British predominance over the Upper Nile, which included an emerging scramble for Uganda following the expulsion of the Kabaka of Buganda, Mwanga II, in 1897.⁹⁸ In 1907, Churchill rode the six-hundred-mile railway and called it “a slender thread of scientific civilization . . . drawn across the primeval chaos of the world,”⁹⁹ but he saw nothing of Uganda. On completion of the railway in April 1902, Sir Clement Hill, the Foreign Office’s Superintendent of African Protectorates, declared the railroad a part of Kenya; he placed East Africa up to the eastern shore of Lake Victoria under one chiefdom, leaving all territory west to another chief. Hill’s decision to relocate the Eastern Province of the Uganda Protectorate to the East African Protectorate removed the huge portion of the Rift Valley stretching to the Kedong River near Naivasha from the traditional control of Ugandan kingdoms, gifting it to what would become Kenya.¹⁰⁰ Mindful, but unmoved by the objection that “the transfer of Uganda’s Eastern Province would

VICTORIA: A NARRATIVE OF EXPLORATIONS IN SEARCH OF THE SOURCE OF THE NILE COMPILED FROM THE MEMOIRS OF CAPTAINS SPEKE AND GRANT (1868); ALAN MOREHEAD, *THE WHITE NILE* (1960); ALAN MOREHEAD, *THE BLUE NILE* (1962); and TIM JEAL, *EXPLORERS OF THE NILE, THE TRIUMPH AND TRAGEDY OF A GREAT VICTORIAN ADVENTURE* (2011).

97. See Henry Gunston, *The Planning and Construction of the Uganda Railway*, 74 TRANS. NEWCOMEN SOC. 45, 45 (2002). See generally CHARLES MILLER, *THE LUNATIC EXPRESS: AN ENTERTAINMENT IN IMPERIALISM* (1971); and M.F. HILL, *PERMANENT WAY: THE STORY OF THE KENYA AND UGANDA RAILWAY* (1949).

98. See D. ANTHONY LOW & R. CRANFORD PRATT, *BUGANDA AND BRITISH OVERRULE: 1900–1955*, TWO STUDIES 8 (1960) (noting the importance of Uganda (Buganda) as the key to the interior following Mwanga’s expulsion).

99. WINSTON S. CHURCHILL, *MY AFRICAN JOURNEY* 4 (solely political) and 5–6 (slender thread of scientific civilization) (1908). For a discussion of the financial failure of the British East Africa Company and the need to convince British Parliament to finance the Uganda railway to secure imperial rather than commercial interests, see RONALD ROBINSON, JOHN GALLAGHER WITH ALICE DENNY, *AFRICA AND THE VICTORIANS: THE OFFICIAL MIND OF IMPERIALISM* 307–311 (1961).

100. See SUZANNE LALONDE, *DETERMINING BOUNDARIES IN A CONFLICTED WORLD: THE ROLE OF UTI POSSIDETIS* 113 (2002) (discussing the transfer of the large portion of Uganda to the East Africa Protectorate, and Hill’s motivations of administrative economy).

involve the severance of the tribes . . . from their natural focus in Uganda,”¹⁰¹ Hill intended to keep the entire railway line under one local colonial administration.¹⁰² Shrinking the kingdom of Buganda and dividing other peoples’ historical territories ceded eventual problems of East Africa’s White Highlands to Kenya,¹⁰³ causing the latter much future conflict; it also fixed Uganda’s relation to Kenya along a divide in Lake Victoria that

101. Kenneth Ingham, *Uganda’s Old Eastern Province: The Transfer to East Africa Protectorate in 1902*, 21 UGANDA J. 41, 44 (1957). Steamer service connected Entebbe (Port Alice) to Kisumu’s Port Florence. *Id.* at 47. The British had to undertake “punitive expeditions against refractory tribes” displaced along the railway line and throughout the territory who were transferred from Uganda’s Eastern Province to the East African Protectorate, including expeditions against the Nandi in 1900, 1903, and between 1905 and 1906, and the Ogaden Somalis in 1901 (after the assassination of a subcommissioner, the Sotik, in 1906, the occupation of Marakwet in 1911, and Northern Jubaland in 1912 and 1914, among the Giriama in 1914, two campaigns in Turkana in 1915 and 1917, and punitive measures again in Jubaland in 1916 and 1917). See REPORT ON THE COLONY AND PROTECTORATE OF KENYA FOR THE YEAR 1927, NO. 1425, 14–15 (1929), http://libsysdigi.library.illinois.edu/ilharvest/Africana/Books2011-05/5530244/5530244_1927/5530244_1927_opt.pdf.

102. See D.A. LOW, FABRICATION OF EMPIRE: THE BRITISH AND THE UGANDA KINGDOMS, 1890–1902, 126 (2009); W.E.F. WARD & L.W. WHITE, EAST AFRICA: A CENTURY OF CHANGE 1870–1970, 71–72 (1971).

103. In addition to consolidating the administration of the Uganda Railway in the East Africa Protectorate, the British deemed the territory suitable for a white man’s country. The term “White Highlands” is derived from that policy of setting aside these agricultural lands in Kenya for settlers of European origin. See generally W.T.W. Morgan, *The ‘White Highlands’ of Kenya*, 129 GEOGRAPHICAL J. 140–55 (1963). The promotion of European settlement was deemed necessary to prevent the railway from turning into a serious financial liability. See LOW & PRATT, *supra* note 97, at 180. To accommodate the nearly one hundred European settlers in the region in April 1903, pastoralist territories of the Masai, on both sides of the Uganda Railway in the Rift Valley, were taken over, and the Masai were removed to reserves sixty miles to the north and toward German East Africa in the south. The Nandi, Lumbwa, and Kavirondo nations were repositioned as part of the East Africa Protectorate. See REPORT ON THE COLONY AND PROTECTORATE OF KENYA FOR THE YEAR 1927, NO. 1425, *supra* note 101, at 13. The 1929 Hilton Young Commission, which formed to investigate closer ties among British territories, concluded that this decision cut the Masai nation into two “with no more concern . . . than the scythe has for a blade of grass.” MCEWEN, *supra* note 62, at 147 (quoting the Hilton Young Commission).

eventually would involve Migingo, stirring ethnic tensions involving Uganda's Bantu-speaking peoples and Migingo's principal future inhabitants, the Luo.¹⁰⁴

II. CARTOGRAPHIC SHORTCUTS AND A FUTURE PROBLEM FOR INTERNATIONAL LAW

The Scramble for Africa resulted in cartographic shortcuts. Many border demarcations were approximated or artificially determined.¹⁰⁵ They were not made in reference to linguistics or ethnicity but in reference to particular geographical features, which presented problems of their own. Malcolm Shaw noted: "[A] number of African boundaries were not demarcated for reasons of expense or lack of trained personnel, while in the case of boundaries between two colonies (or two parts of one colony) belonging to the same State, demarcation was often deemed unnecessary."¹⁰⁶ International Court of Justice (ICJ) judge, Bola Ajibola, took notice of the imperial mindset involving Africa's arbitrary partition, quoting Lord Salisbury's 1890 statement in the *Territorial Dispute* case (Libya/Chad, 1994): "We have been giving away mountains and rivers and lakes to each other, only hindered by the small impediment that we never knew exactly where the mountains and rivers and lakes were."¹⁰⁷ Lord Curzon, who partitioned Bengal for administrative reasons in 1904, and attempted to do the same with Poland,¹⁰⁸ famously encapsulated the "unsurprising" dangers of imperial line drawing,

104. See Tabu Butagira, *Museveni 'feared Raila's Luo plans'*, DAILY MONITOR (Dec. 21, 2010), <http://www.monitor.co.ug/News/National/-/688334/1076120/-/cjwy2mz/-/%2523> (summarizing a U.S. diplomatic cable made public by the Wikileaks website discussing Uganda's concerns about diasporadic Luo communities in western Kenya and in Uganda's Acholi subregion, where many Ugandan opposition Members of Parliament are of Luo origin).

105. See CHARLES DE VISSCHER, *PROBLÈMES DE CONFINES EN DROIT INTERNATIONAL PUBLIC* 17 (1969) (noting "*L'Afrique est celui de tous les continents qui, du fait de ses vastes régions désertiques ou inexplorées, de la faible densité des populations, de l'absence ou de l'ignorance de leur passé historique, s'est prêté le mieux aux délimitations dites artificielles.*").

106. Shaw, *supra* note 86, at 260–61.

107. *Territorial Dispute Case*, (Libya v. Chad), 1994 I.C.J. 6, ¶ 9 (Feb. 3) (separate opinion by J. Ajibola). See also Robert McCorquodale & Raul Pangalangan, *Pushing Back the Limitations of Territorial Boundaries*, 12 EUR. J. INT'L L. 867, 867–68 (2001).

108. See II DAVID DILKES, *CURZON IN INDIA* 204 (1969); PRAMILA SHARMA, *CURZON-NAMA: AUTOCRAT CURZON, UNCONQUERABLE INDIA* 133–41 (1999); See

stating: “Frontiers are indeed the razor’s edge on which hang suspended the modern issues of war or peace, of life or death to nations.”¹⁰⁹ And yet, imprecision involving European treaty making in Africa often reduced it to a level of routine—the British East Africa Company equipped its agents with “parcels of blank *pro forma*, which only required the inscription of the name of the relevant chief, the place, the date, the chief’s mark, and—a point on which the British Foreign Office insisted—the signature of two witnesses.”¹¹⁰ Former *ad hoc* judge of the ICJ, Georges Abi-Saab, objected to the Chamber’s “excessively detailed analysis of French colonial law” in the *Frontier Dispute* case between the two former French colonies, Burkina Faso and Mali, finding it not “fitting . . . for an international court and . . . largely superfluous.”¹¹¹ He negated the legal crossover or *continuum juris* effect in his separate opinion,¹¹² animating Gbenga Oduntan’s observation that it “is becoming generally clear, especially to non-Western judges, that precautions ought to be taken in judgments when considering colonial law.”¹¹³ Aspects of the Migingo Island dispute reflect that imperial insouciance.

A. The 1926 British Order in Council

A 1926 British Order in Council, an administrative measure of governance stemming from Royal prerogative, rather than parliamentary approval,¹¹⁴ grouped the entire 580 mile (933 kilometer) interterritorial boundary “schedule” between the

generally Piotr Eberhardt, *The Curzon Line as the Eastern Boundary of Poland: The Origins and the Political Background*, 85 GEOGRAPHIA POLONICA 5–21 (2012).

109. LORD CURZON OF KEDLESTON, THE ROMANES LECTURES, 1907: FRONTIERS 7 (1908).

110. LOW & PRATT, *supra* note 97, at 3.

111. Frontier Dispute 1986 I.C.J. 554, ¶ 3 (Dec. 22) (separate opinion by J. Abi-Saab).

112. *Id.* ¶ 4.

113. ODUNTAN, *supra* note 46, at 19.

114. An Order in Council is the main form of prerogative legislation stemming from the British monarch’s direct involvement in treaty making and international affairs. Its chief characteristic today vests such powers in government ministries and administrators acting under ministerial directive, and not parliamentary approval. See generally Thomas Poole, *United Kingdom: The Royal Prerogative*, 8 INT’L J. CONST. L. 146, 146–55 (2010). Anthony Asiwaju noted that the borders of modern Africa constituted so much of a “European superimposition” that the legal nomenclature and instruments (such as Orders in Council) for dealing with them have remained exactly the same. Anthony I.

Uganda/Kenya protectorates into essentially three sectors from north to south: from the northern tripoint with Sudan (Mount Zulia) to Mount Elgon; from Mount Elgon to the Mouth of the Sio River on Lake Victoria's northern littoral;¹¹⁵ and from the thalweg¹¹⁶ of the Sio River to the tripoint border with Tanzania, located on the first parallel south (1° south) latitude at "approximately" 33°56' east longitude.¹¹⁷ This latter segment, "with minor variations," aligns Pyramid, Ilemba, Kiringit, Mageta, and Sumba islands along a meridian,¹¹⁸ situating the southern tripoint boundary (demarcating Uganda, Kenya, and Tanzania) in Lake Victoria. The line segment derived from the 1890 latitudinal bilateral agreement between the German and British trading companies.¹¹⁹ It connected longitudinally with a boundary line drawn due south of the westernmost point of Pyramid Island in 1926, part of the three islands making up the sometimes called "Migingo Islands," and extended from Pyramid Island due north "to the most westerly point of Ilemba [Remba] Island."¹²⁰ When connected to the northern segments dividing Uganda and

Asiwaju, *Borders and Borderlands as Linchpins for Regional Integration in Africa: Lessons of the European Experience*, in GLOBAL BOUNDARIES: WORLD BOUNDARIES VOLUME I, 57, 60 (Clive H. Schofield ed., 1994).

115. *Order in Council Annexing to His Majesty's Dominions and including in Kenya Colony certain Territories in Uganda Protectorate*, London, February 1, 1926, 123 (Part 1) BRITISH AND FOREIGN STATE PAPERS 123–25 (1926) [Order in Council].

116. A thalweg is the line of deepest soundings along the course of a river; it is the main navigable channel as opposed to the middle of a river. See Charles Cheney Hyde, *Notes on Rivers as Boundaries*, 6 AM. J. INT'L L. 901, 902–03 (1912) (discussing thalwegs).

117. *Order in Council*, *supra* note 115, at 123–25. See also IAN BROWNLIE, AFRICAN BOUNDARIES: A LEGAL AND DIPLOMATIC ENCYCLOPAEDIA 943–944 (1979). The alignment relied heavily on a survey of the Kanyagerang-Turkwell area conducted by P.W. Perryman in 1922. *Id.* at 942. The 1926 British Order in Council partitioned Uganda yet again, transferring to the British East Africa Protectorate the remaining Rudolf Province of Uganda, a large area bounded in the east and south by Lake Rudolf and the Turkwel River (presently the Turkana District of Kenya's Rift Valley). See *id.* at 940–42. See also *International Boundary Study Kenya–Uganda Boundary*, 139 GEOGRAPHER, OFFICE OF THE GEOGRAPHER, BUREAU OF INTELLIGENCE AND RESEARCH 4 (Aug. 27, 1973), <http://fall.fsulawrc.com/collection/LimitsinSeas/IBS139.pdf>.

118. See VICTOR PRESCOTT & GILLIAN D. TRIGGS, INTERNATIONAL FRONTIERS AND BOUNDARIES: LAW, POLITICS AND GEOGRAPHY 304 (2008).

119. See BROWNLIE, *supra* note 117, at 924–25 (reprinting the 1890 agreement).

120. *Id.* at 944 (reprinting the Order in Council, Schedule (1)).

Kenya, it appears this 86 mile (138 kilometer) border segment skirts Migingo's western shoals by a few hundred meters, placing Migingo wholly within Kenya's borders.¹²¹ Problematically, as Brownlie's *African Boundaries* encyclopedia records, the alignment produced by the 1926 British Order in Council—despite mentioning markers, pillars, and coordinates—was described in terms which to some extent lacked precise definition."¹²² The reference to geographical features cannot produce great precision when "some of those features lack clear definition."¹²³ The use of thalwegs, island chains, and straight line methods of demarcation had administrative and cartographic appeal in a colonial age (and today), but factual evidence in support of *effectivités*, retrospectively applied to cover geospatial regimes not precisely delineated at the time (which subsequently have gained an economic value), also created problems. As the Tribunal of the Permanent Court of Arbitration has noted, such evidence may be voluminous in quantity yet sparse in useful content.¹²⁴ Rivers and thalwegs change course,¹²⁵ as has the navigable channel of the Sio River, one of the physical features used in

121. See Gettleman, *supra* note 32 (quoting Durham University's International Border Research Unit's geographer John Donaldson's conclusion on review of the 1926 British Order in Council). See also *Boundary News: Kenya, Uganda Border Survey and Demarcation in Lake Victoria Will Continue After Difficult Start* [Boundary News], IBRU: CENTRE FOR BORDERS RESEARCH (May 5, 2009), https://www.dur.ac.uk/ibru/news/boundary_news/?itemno=7923&rehref=%2Fibru ("[I]t is likely that the joint survey will find Migingo positioned on the Kenyan side of the boundary.").

122. BROWNIE, *supra* note 117, at 953.

123. *Id.* (noting as well that subsequent demarcations took place in phases in 1927, 1933, and between 1959 and 1960; that uncertainties with regard to alignment at the time of publication (1979) did not pertain to the Migingo area; and that since independence, both countries "have recognized the alignment in principle"). See also Wafula Okumu, *Resources and Border Disputes in Eastern Africa*, 4 J. E. AFR. STUD. 279, 284 (2010) (discussing limitations of colonial boundary making).

124. Award of the Arbitral Tribunal in the First Stage of Proceedings (Territorial Sovereignty and Scope of the Dispute) (Eri./Yemen) 71 (Perm. Ct. Arb. 1998).

125. See STEPHEN B. JONES, *BOUNDARY-MAKING: A HANDBOOK FOR STATESMEN, TREATY EDITORS AND BOUNDARY COMMISSIONERS* 117 (1971) (discussing surveying problems relating to rivers and thalwegs).

the 1926 British Order in Council to demarcate the southern border.¹²⁶ Some evidence suggests that Migingo was the generic name of the undifferentiated island chain, which only later more specifically differentiated the two other islands as Ugingo and Pyramid Island.¹²⁷ Ugandan surveyors claim, however, that Ugingo, which lies east of Migingo, is actually Pyramid Island, as referenced in the 1926 British Order in Council, because it is shaped like a pyramid.¹²⁸ This claim has led Ugandan and Kenyan surveyors to dispute which of the three islands referred to in the colonial boundary documents is Pyramid Island.¹²⁹ Both countries disputed ownership before independence in the early 1960s,¹³⁰ but Ugandan dictator Idi Amin Dada's period of misrule (1971–1979) has served as an explanation for Uganda's inability to sustain its claim. The delicate diplomatic border dispute involving Migingo sits atop abundant fishing stock but also atop broader revanchist sentiments espoused by Amin in 1976,¹³¹ and later hinted at by President Museveni, who dis-

126. See Warui David Njoka, *The East African Community and Dispute Settlement (A Case of Migingo Island)* 78–79 (May 2013) (unpublished M.A. thesis, University of Nairobi Institute of Diplomacy and International Studies), <http://erepository.uonbi.ac.ke/handle/11295/52603?show=full> (noting that the Sio River has changed its course a number of times, producing different surveying interpretations as to fixing the thalweg's location).

127. See *Boundary News*, *supra* note 121 (noting but discounting the possible problem concerning the islands having multiple names).

128. See Odoobo C. Bichachi, *Why Have Survey Teams Failed to Agree on Migingo?*, DAILY MONITOR (Mar. 27, 2016), <http://www.monitor.co.ug/Magazines/PeoplePower/Why-have-survey-teams-failed-to-agree-on-Migingo/-/689844/3134672/-/gm560gz/-/index.html>.

129. Paragraph 6 of the Joint Communiqué reads: "In determining the location of Migingo Island, the survey team is informed by arguments from both sides on which of the two islands next to Migingo constitute the Pyramid Island. In this regard, straight lines shall be drawn from Rmeba (Ilemba) Island to the two islands." See Samwel Kumba, *Why Migingo Survey Stalled*, DAILY NATION (Aug. 7, 2009), <http://www.nation.co.ke/news/-/1056/636292/-/4fjlcrlz/-/index.html>. Another sticking point involves Ugandan surveyors' insistence that that buoys be placed as permanent border markers in the lake. See Bichachi, *supra* note 128.

130. See Shaka, *supra* note 41, at 35.

131. See Bamuturaki Musinguzi, *The Day Idi Amin Wanted to Annex Western Kenya*, EAST AFRICAN (Sept. 10, 2011), <http://www.theeastafrican.co.ke/news/The+day+Idi+Amin+wanted+to+annex+western+Kenya/-/2558/1234090/-/u5ilxrz/-/index.html> (recalling Amin's 1976 claim for the return of Kenyan districts ceded by British colonial rule).

cussed the restoration of Greater Uganda by extending the territory to near Naivasha.¹³² Shifting one border, even by a matter of meters, to accommodate Migingo's fate, however, tempts a domino effect of border transformations between the two countries that neither disputant can countenance.

III. UTI POSSIDETIS, LES EFFECTIVITÉS, AND AFRICAN ELITES

The arbitrary effects of boundary drawing by retreating colonial powers has been well studied in the Americas, Africa, and Asia.¹³³ The justifications for the doctrine emphasized convenience and expediency,¹³⁴ the desire to quiet title and prevent controversy over postcolonial boundary contours, and the avoidance of competing territorial claims based on *terra nullius* (land belonging to no one).¹³⁵ Presumptively, states emerging from decolonization were to inherit the colonial borders held at the time of independence.¹³⁶ *Uti possidetis* served to freeze territorial title based on colonial maps, however imprecise, or actual territorial possession, "no matter how arbitrary those boundaries may have

132. *MUSEVENI: Uganda territory extends up to Nakuru, Mzee Kenyatta Grabbed Our Land*, POLITICA (Jan. 7, 2016), <http://www.politics.co.ke/global/museveni-uganda-territory-extends-nakuru-mzee-kenyatta-grabbed-land/> (quoting Ugandan President Museveni's claim that "[t]he original world maps of 1924 shows clearly Uganda extends to almost Naivasha").

133. See, e.g., Paul R. Hensel, Michael E. Allison & Ahmend Khanani, *The Colonial Legacy and Border Stability: Uti Possidetis and Territorial Claims in the Americas* (International Studies Association Meeting, Montreal, 2004), https://www.researchgate.net/profile/Paul_Hensel/publication/253878664_The_Colonial_Legacy_and_Border_Stability_Uti_Possidetis_and_Territorial_Claims_in_the_Americas/links/00b7d5326ea9761b12000000.pdf; Steven R. Ratner, *Drawing a Better Line: Uti Possidetis and the Borders of New States*, 90 AM. J. INT'L L. 590 (1996); Jan Klabbers & René Lefeber, *Africa: Lost Between Self-Determination and Uti Possidetis*, in PEOPLES AND MINORITIES IN INTERNATIONAL LAW 37 (Catherine Brölmann, René Lefeber & Marjoleine Zieck eds., 1993); see generally SAADIA TOUVAL, *THE BOUNDARY POLITICS OF INDEPENDENT AFRICA* (1972); Temple of Preah Vihear (Cambodia v. Thail.), Judgment, 1962 I.C.J. 6 (June 15); Rann of Kutch Arbitration (India/Pak.), reprinted in 7 I.L.M. 633 (1968).

134. A.O. CUKWURAH, *THE SETTLEMENT OF BOUNDARY DISPUTES IN INTERNATIONAL LAW* 113 (1967).

135. Land, Island, and Maritime Frontier Dispute (El Sal./Hond.: Nicar., intervening), Judgment, 1992 I.C.J. 351, 387 (Sept. 11); Enver Hasani, *Uti Possidetis Juris: From Rome To Kosovo*, 27 FLETCHER F. WORLD AFF. 85, 86 (2003).

136. See Ratner, *supra* note 133, at 590.

been drawn.”¹³⁷ Despite its lack of precision¹³⁸ and coercive elements,¹³⁹ *uti possidetis* became, and remains, a major building block of the international legal system.¹⁴⁰ The ICJ validated it as “a general principle,”¹⁴¹ and its application expands beyond the postcolonial settings that gave birth to its application.¹⁴² Like the emergence of sovereignty’s double sword of imperial and papal power in the early modern European age,¹⁴³ *uti possidetis* transmuted to accommodate the interests of African elites,¹⁴⁴ informing the Charter of the Organization of African Unity (“OAU”),¹⁴⁵ appearing in Article 4(b) of the African Union’s Constitutive Act,¹⁴⁶ taking its place in the 1964 OAU Cairo Declaration,¹⁴⁷ and shifting subsequent African border discussions

137. See Klabbers & Lefeber, *supra* note 133, at 37.

138. See C.H.M. Waldock, *Disputed Sovereignty in the Falklands Islands Dependencies*, 25 BRIT. Y.B. INT’L L. 311, 325 (1948) (labeling it “indefinite and ambiguous”).

139. See TOUVAL, *supra* note 133, at 17 (noting that an element of coercion is almost universally involved in *uti possidetis*’ application).

140. See Frontier Dispute (Burkina Faso/Mali), 1986 I.C.J. 554, 567 (Dec. 22).

141. *Id.* at 565. See also Case Concerning the Territorial Dispute (Libya/Chad), 1994 I.C.J. 6, 89 (sep. op. J. Ajibola).

142. See, e.g., Opinion No. 3, Dec. 17 1991, Badinter Commission (applied beyond the colonial context following ethnic cleansing in the former Yugoslavia). Opinion No. 3, the Arbitration commission of the Peace Conference on Yugoslavia [Badinter Commission], Jan. 11, 1992, *reprinted at* 31 I.L.M.1499 n. 14, 1500 (1992).

143. See Hent Kalmo, *Sovereignty: A Painful State*, 63 HIST. TODAY (Jan. 1, 2013), <http://www.historytoday.com/hent-kalmo-sovereignty-painful-state>.

144. See Mbembe, *supra* note 36, at 261–62 (summarizing a prevailing idea that African elites adopted distortions of colonial boundaries, adhered to the dogma of their intangibility, and granted them a kind of legitimacy).

145. See Charter of the Organization of African Unity art. III (3), 479 U.N.T.S. 39, May 25, 1963 (respecting “the sovereignty and territorial integrity of each State and for its inalienable right to independent existence”), http://hrlibrary.umn.edu/africa/OAU_Charter_1993.html.

146. CONSTITUTIVE ACT OF THE AFRICAN UNION [OAU] (July 11, 2000), <http://www1.uneca.org/Portals/ngm/Documents/Conventions%20and%20Resolutions/constitution.pdf> (calling for “respect of borders existing on achievement of independence”).

147. Resolution on the Intangibility of Frontiers, OAU Doc. AGH/Res. 16 (I) (1964), *reprinted in* DOCUMENTS OF THE ORGANIZATION OF AFRICAN UNITY 49 (Gino J. Naldi ed., 1992).

away from questions of colonial illegitimacy toward the management domestic needs.¹⁴⁸ African critics of the principle nevertheless acknowledge its grip over boundary alignments of the continent, which are far more maintained than in Spanish America, Europe, or Asia.¹⁴⁹ Explanations focus on political consolidation and state-building efforts of newly independent African states, where centralizing state authority and codifying national identity and unity outweighed the focus on secondary issues, like borderland integrity.¹⁵⁰ Postcolonial African statecraft presented the inward-looking project of crafting imagined political community, while porous and peripheral borders and commitments to Pan-African ideals “only mattered in contexts where they did not conflict with national interest.”¹⁵¹ Application of *uti possidetis* compels Uganda and Kenya to accept the 1926 British Order in Council and the schedules to the 1995 Ugandan Con-

148. See, e.g., *Memorandum of Understanding on Security, Stability, Development and Cooperation in Africa (CSSDCA)*, OAU ASSEMBLY OF HEADS OF STATE AND GOVERNMENT (July 2002) Decision Cm/Dec.666 (LXXVI) (providing for the delineation and demarcation of African boundaries by 2012, where such an exercise has not yet taken place); *Declaration on the African Union Border Programme and its Implementation Modalities as Adopted by the Conference of African Ministers in Charge of Border Issues held in Addis Ababa* (June 7, 2007), <http://www.peaceau.org/uploads/border-issues.pdf> (noting that the parties were guided by respect of borders existing on achievement of national independence); *Declaration on the African Union Border Programme and the Modalities for the Pursuit and Acceleration of its Implementation*, Addis Ababa (Mar. 25, 2010), <http://www.peaceau.org/uploads/aubp-dec-e.pdf> (recalling the principle of respect of borders existing on achievement of national independence).

149. See e.g., DIRDEIRY M. AHMED, *BOUNDARIES AND SECESSION IN AFRICA AND INTERNATIONAL LAW: CHALLENGING UTI POSSIDETIS* (2015). Ahmed notes that 90 percent of Spanish New World boundaries underwent substantial change, and twenty or so new states have been created in Asia and Europe in twenty-five years following the end of the Cold War, but the political map of Africa has remained the same, except for the cases of Eritrea and South Sudan. *Id.* at 1. Cf. Mbembe, *supra* note 36, at 271 (“[B]oundaries from colonialism have remained essentially unaltered.”).

150. See KALU N. KALU, *STATE POWER, AUTARCHY, AND POLITICAL CONQUEST IN NIGERIAN FEDERALISM* 12 (2008) (discussing the analytical framework for African state formation).

151. Wekesa, *supra* note 23, at 334.

stitution and the 1963 Kenyan Constitution as the primary documents dealing with the dispute.¹⁵² Other legislative, geographic, and constitutional sources confirmed the schedule demarcation of the 1926 British Order in Council.¹⁵³ The rule is not in dispute. Rather, the countries dispute the facts pertaining to the exact location of the westernmost point of any given island as described by the 1926 British Order in Council.¹⁵⁴

A. Historical Confusion, Uti Possidetis, and the Value of Effectivités

When historical confusion obscures the establishment of definitive legal title, international law processes the application of *uti possidetis* through international courts and tribunals, which seek out two elements in establishing sovereign authority: the intention to act as sovereign, and some actual exercise or display of such authority.¹⁵⁵ Together, they establish a discernable expression of sovereign authority—*à titre de souverain*.¹⁵⁶ When à

152. See National Assembly Official Report, KENYA NAT'L ASSEMBLY OFFICIAL REC. (HANSARD) 1–2 (Dec. 14, 2010) (referencing the Kenya-Uganda Joint Border Commission's joint communiqué accepting the primary documents).

153. See The Kenya Independence Order in Council, No. 1968 (1963) KENYA GAZETTE SUPPLEMENT No. 105; *International Boundary Study Kenya-Uganda Boundary*, *supra* note 117; CONSTITUTION art. 5, 174, 187 (1995) (Uganda); *re-affirming* CONSTITUTION, Schedule 1, The Boundary of Uganda, art. 2(2), 83, 90–91 (1967) (Uganda) (“[T]hence following a straight line southerly to the most westerly point of Ilemba [Remba] Island; thence following a straight line southerly to the westernmost point of Pyramid island; thence following a straight line due south to a point on latitude 01000’S.”); and the Kenya Colony and Protectorate (Boundaries) Order in Council 1926; Brownlie cites as additional confirmations the IX Laws of Uganda, Rev. 31 (1964); CONSTITUTION, Schedule 1 (1967) (Uganda), XI Laws of Kenya, Rev. group 2, at 7 (1962); and Kenyan Legal Notices Nos. 386 (1961) and 193 and 207 (1963), in addition to Kenya Legal Notice No. 718, *supra*. See BROWNIE, *supra* note 117, at 945.

154. *Id.* at 2.

155. Legal Status of Eastern Greenland (Den. V. Nor.), 1933 P.C.I.J. (ser. A/B) No. 53, 45–46 (Apr. 5).

156. Award of the Arbitral Tribunal in the First Stage of the Proceedings between Eritrea and Yemen (Territorial Sovereignty and Scope of the Dispute), 22 R.I.A.A. 268, ¶ 241 (1998) (requiring evidence of a consolidation of title for establishment of claims of *à titre de souverain*); Malcolm Shaw, *The International Court of Justice and the Law of Territory*, in THE DEVELOPMENT OF INTERNATIONAL LAW BY THE INTERNATIONAL COURT OF JUSTICE 151, 168 (Christian J. Tams & James Sloan eds., 2013).

titre de souverain is established, international law will not accommodate additional arguments to upset the status quo.¹⁵⁷ Establishment of an *animus occupandi*—an actual intent and ability to exercise power and authority—exercised through immemorial usage or uncontested demonstrable claim—has been deemed a relevant indicator of good title.¹⁵⁸ But, where the status quo remains in dispute, decisionmakers will seek out pre-colonial or postcolonial factual circumstances—*effectivités*—as supplementary means of ascertaining sovereignty.¹⁵⁹

Charles De Visscher devoted a monograph to the subject of *effectivité*, noting its dynamic aspects (*en action*), as contrasted to its structural forms (*d'effectivités menées à terme*),¹⁶⁰ and its functions of promoting practicality, stability, security, continuity, and finality to disputes.¹⁶¹ De Visscher cautioned against expansive applications or errors likely to result from the full pursuit of its application.¹⁶² Similarly, Jean Touscoz argued against expansive extrapolations of its meaning, emphasizing its identity as a concrete supplement to conditions that exist.¹⁶³ Recourse to the principle of *effectivité* cannot create sovereignty; it can only confirm or validate sovereignty.¹⁶⁴ But, proof of *effectivité* often creates cottage industries revolving around proof of competing historical narratives. Disputes over *effectivités* following Spain's 1810 retreat from the New World involved deciphering the imprecisions of colonial maps charted in the sixteenth

157. Frontier Dispute (Burkina Faso/Mali), 1986 I.C.J. at 586–87.

158. Eritrea v. Yemen, 22 R.I.A.A. 268, ¶239 (Perm. Ct. Arb. 1988).

159. Honduras Borders (Guat./Hond.), 2 R.I.A.A. 1307, 1325 (Perm. Ct. Arb. 1933); CHARLES DE VISSCHER, LES EFFECTIVITÉS DU DROIT INTERNATIONAL PUBLIC 111–14 (1967) (discussing “*Le rôle secondaire de l’effectivité à l’encontre d’un titre conventionnel dans les contestations de frontières*”).

160. See DE VISSCHER, *supra* note 159, at 13–24.

161. See *id.* at 153–58.

162. See *id.* at 151–52 (“*Il convient toutefois de se mettre en garde dès l’abord contre une erreur assez fréquente qui conduit à confondre la recherche de l’effectivité, qui n’est autre ici que celle de la pleine réalisation du droit, avec l’interprétation extensive. L’effectivité du droit judiciairement applicable tend non pas à donner à la règle son maximum d’effet intellectuellement concevable, mais seulement à lui assurer, compte tenu des textes, des circonstances de fait et de milieu, toute la place que lui assigne la source de droit dont elle procède.*”).

163. JEAN TOUSCOZ, LE PRINCIPE D’EFFECTIVITÉ DANS L’ORDRE INTERNATIONAL 2 (1964) (“*L’effectivité est la nature de ce qui existe en fait, de ce qui existe concrètement, réellement; elle s’oppose à ce qui est fictive, imaginaire ou purement verbal.*”).

164. Frontier Dispute (Burkina Faso/Mali), 1986 I.C.J. 587.

century.¹⁶⁵ Arguments involving border disputes in Europe, for instance, in the ongoing dispute over Nagorno-Karabakh, generate entitlement claims that stretch back more than a millennium.¹⁶⁶ China's assertion of historic rights over the South China Sea stem from "a long course of history," which the tribunal in the *South China Sea Arbitration* could not understand due to China's ambiguity on the issue; although China was absent from the proceedings, the tribunal nevertheless noted a more recent date when China's "nine-dash line" first appeared on an official Chinese map: 1948.¹⁶⁷ Without a doubt, *effectivités* are meaningful when they are not contrived, as they sometimes may be used to instantiate a historical narrative over who was the first finder; but, they lack probative meaning with regard to Migingo. A requisite *animus occupandi* was never at issue until changes to the lake's hydrological water table made it a suitable port for harvesting Nile perch hardly more than one decade ago. Both countries embrace an *animus occupandi*, but circumstances forestall either country's territorializing objective.

CONCLUSION

Ugandan and Kenyan leaders find themselves in a double bind over Migingo: rhetorical respect for *uti possidetis* informs their political identity and motivates them to adhere to a postcolonial principle of boundary demarcation to which they cannot completely abide, while they search for supporting *effectivités* that do not historically exist in order to claim better title to an islet that had no significance until it was accessed to hunt a valuable nonnative resource that is devastating the biology of the lake. The countries seek to establish better title from constitutive documents to a border demarcation imprecisely devised from a colonial decision to administer a railway under a single jurisdiction more than one century ago, an act which itself dislodged populations and hinged partly on a previous decision by German and British trading companies to cleave Lake Victoria into sov-

165. LALONDE, *supra* note 100, at 31 (noting the vague and imprecise border demarcations of Iberian monarchs in the New World).

166. See TIM POTIER, CONFLICT IN NAGORNO-KARABAKH, ABKHAZIA AND SOUTH OSSETIA: A LEGAL APPRAISAL 1 (2001) (noting historical conquests and disputed territorial claims dating to the early eighth century).

167. In the Matter of the South China Sea Arbitration (Phil. v. China), P.C.A. No. 2012-19, ¶¶ 180–87 (July 12, 2016).

ereign halves. When the search for *les effectivités* hinges on historical obscurities or uncertainties and is marked by an epoch of imperial line drawing that preferred administrative economy over human geography, the purported formalism of international law, as measured by rational outcomes supporting certainty and finality, appears less rational and functional. Beneath the legal formalism of *uti possidetis*, complex modalities of engagement and practice are at work. These modalities seek to enhance territorializing interests but, failing that, present prospects for cooperation and condominium (or stasis). Despite the territorializing temptation that hampers condominium solutions, markers suggest that the principals are content to continue with the indeterminate course of dealing that supports nonresolution of the border dispute, perhaps until the workings of a shared solution present themselves in the form of answers to the much more serious economic, social, and political issues suggested by sweeping degradations to Lake Victoria's environmental basin. Evidence of an intersubjective will to forestall a solution appears from a tally of circumstantial complaints. The dispute is more than ten years old, with little momentum trending toward a solution. At least three technical survey teams have formed since 2009, and each has failed to carry out its mission. The disputants agree on the constitutive documents demarcating the border question, a point often in dispute and fatal to other negotiated border settlements. Rhetorical statements from leaders express a willingness to negotiate a diplomatic solution. Officials from both countries have proposed removing the dispute to an international tribunal for settlement,¹⁶⁸ but no formal efforts have been made, and the suggestion engenders complaints about bypassing the principle of subsidiarity, which preferences African regional dispute mechanisms over broader fora.¹⁶⁹ An important corollary to constructivist approaches, as informed by historical context, is that constructivism need not result in a new form of idealism, as many enthusiasts hope.¹⁷⁰ The intersubjective structures of international relations create

168. John Donaldson, *Re-thinking International Boundary Practices: Moving Away from the 'Edge'*, in *GEOGRAPHIES OF PEACE* 89, 98 (Fiona McConnell, Nick Megoran & Philippa Williams eds., 2014).

169. Wafula Okumu, *Migingo Dispute Needs an African Solution*, ISS (May 28, 2009), <https://www.issafrica.org/iss-today/migingo-dispute-needs-an-african-solution>.

170. See Reus-Smit, *supra* note 55, at 21.

norms that produce their own dynamics, but there is no implied progressivity or beneficial outcome. The Mingingo Island dispute serves as a case in point.

The Mingingo Island dispute also presents challenges to East African regionalization efforts. An array of intersubjective and cooperative East African institutions support prospects for cooperation. The East African Community Treaty emphasizes sustainable utilization and protection of natural resources,¹⁷¹ with specific reference to the management of Lake Victoria.¹⁷² The Lake Victoria Basin Commission and Lake Victoria Fisheries Organization maintain responsibility over maritime security and fisheries on the lake.¹⁷³ The East African Community Strategy for Regional Peace and Security promotes policy direction on peace and security.¹⁷⁴ Both Kenya and Uganda are members of regional multilateral organizations, including the Common Market for Eastern and Southern Africa, the Intergovernmental Authority on Development, and the International Conference on the Great Lakes Region.¹⁷⁵ In 1999, the Nile Basin Initiative, a regional intergovernmental partnership involving ten countries, launched to promote cooperation and dialogue and achieve sustainable socioeconomic development among riparian stakeholders.¹⁷⁶ Institutional supports for a negotiated solution exist, providing agencies for the realization of intersubjective goals. Wekesa has noted achievements of African regional integration,¹⁷⁷ including the structures and shared discursive subjectiv-

171. See Treaty Establishing the East African Community Nov. 30, 1999, art. 5(3)(a), art. 5(3)(c), http://www.eac.int/sites/default/files/docs/treaty_eac_amended-2006_1999.pdf.

172. *Id.* art. 114(2)(b)(vi) (agreeing to “the establishment of a body for the management of Lake Victoria”).

173. See *id.* art. 9 (referencing the Lake Victoria Fisheries Organization); See generally LAKE VICTORIA BASIN COMMISSION, <http://www.lvbcom.org/> (last visited July 21, 2017). See also 4TH EAC DEVELOPMENT STRATEGY (2011/12–2015/16): DEEPENING AND ACCELERATING INTEGRATION, E. AFR. COMMUNITY DEV. STRATEGY §§ 3.63, 3.64, http://www.eac.int/sites/default/files/docs/strategy_eac_development-v4_2011-2016.pdf.

174. For background information, see generally INTERNATIONAL CONFERENCE ON THE GREAT LAKES REGION, <http://www.icglr.org/index.php/en/background> (last visited July 21, 2017).

175. See Wekesa, *supra* note 23, at 332.

176. See generally NILE BASIN INITIATIVE/INITIATIVE DU BASSIN DU NIL, <http://www.nilebasin.org/> (last visited July 21, 2017).

177. Wekesa, *supra* note 23, at 337.

ities that may yield a negotiated condominium solution. But, enthusiasm wanes as this dispute lingers,¹⁷⁸ giving rise to concerns that Migingo's fate is more conditioned by overarching territorializing solutions rather than the condominium arrangements that ultimately provide the broader safeguards needed to stave off a coming crisis for this Great Lake and its catchment.

178. *See id.* (noting the Migingo crisis does not bode well for the future of the East African Community).